IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 672

GIANT FOOD INC., *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

REPLY TO OPPOSITION OF THE FEDERAL TRADE COMMISSION

This brief in reply to the Federal Trade Commission's opposition to the petition for writ of certiorari in the above-captioned matter is filed in conformity with the rules of practice of this Court.

ARGUMENT

In opposing the petition for writ of certiorari, the Federal Trade Commission makes several points which require clarification.

The first point requiring clarification is the Commission's assertion that petitioner does not seek a re-

view of the holding below that a retailer who has induced its suppliers to violate Section 2(d) of the Clayton Act is itself guilty of engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. This assertion is erroneous. Petitioner does seek review of that holding. However, inasmuch as this Court denied a petition for certiorari based on precisely that holding in *American News Co.* v. *Federal Trade Commission*, S. Ct. , 371 U.S. 824 (1962), petitioner did not seek certiorari on the basis of that holding. Rather, it sought a writ of certiorari on issues which heretofore have never been presented to this Court. The precise issue to which the Commission makes reference is set forth in footnote 1 on page 3 of the petition. In the event the petition is granted, this issue will be presented.

The second point raised by the Commission which requires clarification is the Commission's bald assertion that the issues raised by the petition present nothing more than "narrow questions" of "whether there was sufficient proof." This, too, is erroneous. The issue presented by the petition is not whether there was substantial proof upon the whole record to support findings which were the predicates of the Commission's decision but, rather, whether the Commission in a proceeding under Section 5 could eliminate an essential element of proof. The issue is not one of substantial evidence but, rather, whether there is any evidence in the record at all. The issue involves the philosophy and theoretical apparatus which formed the basis for the Commission's action against petitioner. To prove that petitioner had induced its suppliers to violate Section 2(d), the Commission had to show that peti-

tioner had received promotional payments from suppliers which competitors of the petitioner did not receive from such suppliers in connection with the purchase of products of a grade and quality similar to the products on which petitioner received promotional payments. The naked assertion that the payments were made for promotion of articles and brands which are "household bywords throughout the country" is meaningless. Such an assertion does not and cannot sustain a finding that products of a grade and quality similar to those on which payments were made to petitioner were ever sold by suppliers participating in petitioner's promotion to petitioner's competitors. Such an assertion is also subject to the same defects as the Commission's logic that it was "reasonable to *infer* that products of grade and quality similar to those [petitioner] promoted in the [anniversary] sales were also being resold by [petitioner's] competitors not sharing in the [payments]" (JA 124). The inference was not justified by the record. The same type of assertion and logic were specifically rejected by the Second Circuit in reviewing a proceeding which the Commission had brought against one of petitioner's suppliers: *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365, 368 (C.A. 2, 1958). In that case, the examiner, whom the Commission sustained, held that all the products involved were pork, "and to the hearing examiner, ham is ham . . ." The Second Circuit reversed, holding that for the purposes of the Clayton Act, the Commission could not proceed on the assumption that because two products were derived from the same animal, they were of similar grade and quality.

The last point in the Commission's brief which requires clarification here is the assertion that *Automatic Canteen*, 346 U.S. 61, 73 S. Ct. 1017 (1953), supports rather than conflicts with the decision below. The Commission argued that petitioner should have borne the burden of the 2(b) defense because evidence of meeting competition was more available to the petitioner than to the Commission. This fact is not true. Petitioner had no knowledge of the basis on which any of its suppliers participated in its anniversary promotion. Petitioner could only assume, as this Court must in the absence of evidence to the contrary, that participants were conforming to the requirements of the Clayton Act when they made promotional payments to petitioner.

CONCLUSION

For the reasons stated hereinabove and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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